BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROBBIE M. MEDELLIN	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,016,943
GOODYEAR TIRE & RUBBER COMPANY	)	
Respondent	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appealed the May 1, 2006, Award entered by Administrative Law Judge Robert H. Foerschler. The Workers Compensation Board heard oral argument on July 18, 2006.

APPEARANCES

Keith V. Yarwood of Kansas City, Missouri, appeared for claimant. James K. Blickhan of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for a March 29, 2004, accident. In the May 1, 2006, Award, Judge Foerschler determined claimant was entitled to receive permanent disability benefits for a 15 percent whole person functional impairment for his work-related injuries. The Judge concluded claimant was not entitled to receive compensation for a work disability (a permanent partial general disability greater than the functional impairment rating).

Claimant contends Judge Foerschler erred. Claimant argues he made a good faith effort to secure employment after he was terminated from his employment with respondent.

Furthermore, even if he failed to make a good faith effort to secure employment, claimant argues a post-injury wage should be imputed to determine his wage loss for the work disability formula. When considering his wage and task losses, claimant requests the Board to find he is entitled to receive benefits for a 70 percent permanent partial general disability.

Respondent and its insurance carrier contend Judge Foerschler correctly concluded that claimant was not entitled to receive benefits for a work disability in light of unconvincing evidence and claimant's alleged negative attitude toward medical treatment and rehabilitation. In the alternative, should the Board determine claimant is entitled to work disability benefits, respondent and its insurance carrier contend claimant's work disability is 21 percent, which is based upon a 15 percent wage loss and a 27 percent task loss. Additionally, they argue claimant's right to future medical benefits should be denied as claimant suffered a later accident in which he injured his back. Respondent and its insurance carrier ask the Board to affirm the award of disability benefits but deny claimant's entitlement to seek future medical benefits in this claim.

The issues before the Board on this appeal are the nature and extent of claimant's disability and claimant's right to future medical benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes the Award should be modified.

The parties agree on March 29, 2004, claimant fell from either scaffolding or a loft while inventorying tires. Claimant landed on a concrete floor. Likewise, the parties agree claimant's accident arose out of and in the course of his employment with respondent.

In the May 1, 2006, Award, Judge Foerschler found claimant sustained a 15 percent whole person functional impairment as a result of the March 2004 accident. Neither party challenges that finding on this appeal. Rather, respondent and its insurance carrier request the Board to affirm that finding and to affirm the Judge's award of disability benefits based upon that impairment rating. And claimant does not dispute the Judge's finding of functional impairment but, instead, challenges the Judge's conclusion that his permanent disability benefits should be limited to that rating. Consequently, the Board affirms the Judge's finding that claimant sustained a 15 percent whole person functional impairment due to the injuries he received to his low back and his left arm due to the March 2004 accident.

Following his accident, claimant was referred to orthopedic physician Dr. Jeffrey T. MacMillan who diagnosed degenerative disc disease, including a herniated disc, in claimant's lumbosacral spine and prescribed epidural steroid injections for claimant's low back. When those injections failed to resolve claimant's low back complaints, the doctor

discussed other treatment alternatives with claimant, including some form of interbody fusion, which the doctor believed would have been an excellent choice. But claimant opted for less invasive treatment and chose work conditioning, which he did for only a few days. The doctor also referred claimant for a functional capacities evaluation. That testing, however, proved inconclusive.

At some point, claimant requested disc decompression therapy. But, according to claimant's testimony, respondent's insurance carrier denied that treatment. Nonetheless, according to a December 9, 2004, medical report from Dr. P. Brent Koprivica, claimant was receiving intradiscal decompression therapy when Dr. Koprivica examined claimant on that date. The record does not clarify that inconsistency.

On September 29, 2004, Dr. MacMillan determined claimant had reached maximum medical recovery. After that time, the doctor provided claimant with no other medical treatment options other than pain medications. The doctor concluded claimant, in general, could perform work that fell within the sedentary physical demand level and some light to medium work.

At his attorney's request, claimant was evaluated by Dr. P. Brent Koprivica. The doctor examined claimant in early December 2004 and concluded claimant should limit himself to sedentary activities. In addition, the doctor recommended, among others, that claimant alternate sitting and standing or walking; and, likewise, avoid squatting, crawling, kneeling, and climbing. The doctor also recommended some restrictions for the left upper extremity problems.

Neither Dr. Koprivica nor Dr. MacMillan felt claimant's decision to forego low back surgery was inappropriate. Indeed, Dr. Koprivica felt claimant had psychological factors that should be evaluated by a psychiatrist before undergoing surgery. The evidence does not support the respondent's argument that claimant did not cooperate with medical treatment.

Claimant did not return to work for respondent after the March 2004 accident. Following his release from medical treatment in September 2004, claimant began looking for work and he also applied for unemployment benefits. The record does not disclose whether claimant attempted to resume his job with respondent. But in January 2005, respondent terminated claimant's employment for invoice procedure violations and improper check handling, which allegedly occurred shortly before his work-related accident. In January 2005, claimant applied for Social Security disability benefits.

Claimant's job search efforts ended, however, in early March 2005, when he fell approximately three stories from a window and landed on either an awning or the roof of an adjoining building. According to claimant, the fall fractured his pelvis, right wrist and his back. Despite attributing the 2005 incident to depression and financial hardship stemming

from his March 2004 accident at work, claimant does not assert any claim for benefits for the 2005 injuries. Following the 2005 incident, claimant spent a significant time in a wheelchair.

At his regular hearing, claimant stated he has resumed looking for work. Few details regarding his present job search were presented other than claimant has posted his resume on an internet job site and he has registered with a job service agency. More importantly, claimant testified at the regular hearing that he was receiving Social Security disability benefits.

1. Does claimant's termination preclude an award of work disability benefits?

The principal issue in this claim is whether claimant's permanent partial general disability should be limited to his whole person functional impairment rating or whether claimant is entitled to receive benefits for a work disability. Respondent and its insurance carrier argue respondent would have taken claimant back to work but for his having been fired for violating company policy. Conversely, claimant argues he made a good faith effort to find work and, therefore, he is entitled to receive a work disability.

Because claimant's injuries comprise an "unscheduled" injury, his permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e. That statute provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.** Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross**

> **weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

But that statute must be read in light of *Foulk*[1] and *Copeland*.[2] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages, rather than actual wages, when the worker failed to make a good faith effort to find appropriate employment after recovering from the work injury.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[3]

The Kansas Court of Appeals in *Watson*[4] held that the failure to make a good faith effort to find appropriate employment did not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker failed to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based upon all the evidence, including expert testimony concerning the capacity to earn wages.

> In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder *[sic]* must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.[5]

Moreover, the fact a worker is terminated for reasons other than his or her work-related injury does not preclude an award of work disability benefits.[6]

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[1] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[2] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[3] *Id.* at 320.

[4] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

[5] *Id.* at Syl. ¶ 4.

[6] *Beck v. MCI Business Services, Inc.,* 32 Kan. App. 2d 201, 83 P.3d 800, *rev. denied* 276 Kan. 967 (2003); *Gadberry v. R.L. Polk & Co.,* 25 Kan. App. 2d 800, 975 P.2d 807 (1998).

The Board believes the analysis of permanent partial general disability goes beyond the mere inquiry of whether a worker was terminated for violating company policy. The analysis and test are much broader. The appropriate test is whether a worker has made a good faith effort to retain work or to find other employment. And the facts surrounding a worker's termination comprise *only one* of the factors that should be considered.

The circumstances surrounding claimant's termination are somewhat unclear. Claimant apparently sold wheels and tires to a customer but failed to enter the invoice into respondent's records before the customer left the premises. Later, respondent was notified the customer had allegedly used someone else's checking account and identity. Claimant's testimony, however, is uncontradicted that he followed respondent's procedure to obtain authorization for the check or checks that were written. Claimant also denies knowing the customer and participating in the alleged scam.

The incident was investigated by the local police. No charges were filed against claimant. Nonetheless, respondent terminated claimant approximately nine months later. Moreover, the record reveals claimant had previous difficulties with his district manager. Claimant had also leveled racial discrimination charges against respondent. Respondent provided no explanation why claimant's termination occurred months after the alleged scam.

The Board concludes claimant's termination does not preclude an award of work disability. Claimant has neither attempted to manipulate his workers compensation award nor has he otherwise engaged in activity that is tantamount to refusing to work. He may have violated company policy by delaying the preparation of an invoice. But that act does not constitute a lack of good faith effort to perform work for purposes of the work disability test. The evidence does not establish that claimant engaged in any dishonest act or otherwise committed some act that facilitated respondent's loss. In short, there is no evidence that preparing the invoice or invoices in a more timely manner would have prevented respondent's loss. This claim is controlled by the *Niesz*[7] case in which the reason given for the worker's termination was a sham or, at a minimum, after an inadequate investigation.

2. What is claimant's wage loss for purposes of the permanent partial general disability formula?

Claimant provided a list of 35 contacts he made from October 26, 2004, to March 7, 2005, looking for employment. The Board concludes claimant made a good faith effort to find other employment until March 7, 2005, when he sustained his most recent accident.

[7] *Niesz v. Bill's Dollar Stores*, 26 Kan. App. 2d 737, 993 P.2d 1246 (1999).

Consequently, for purposes of the wage loss prong of the permanent partial general disability formula, claimant had a 100 percent wage loss through March 6, 2005.

But claimant has failed to prove he made a good faith effort to find employment after March 7, 2005. Accordingly, a post-injury wage must be imputed for that time period based upon claimant's retained abilities.

Respondent and its insurance carrier's vocational expert, Terry L. Cordray, testified claimant retained the ability to earn from $9 to $10 per hour, and perhaps up to $12 per hour if he could obtain a job as a dispatcher or order clerk. On the other hand, claimant's expert vocational witness, Michael J. Dreiling, testified claimant retained the ability to earn $8 per hour. Considering the opinions of both experts, the Board concludes claimant retains the ability to earn $9 per hour, or approximately $360 per week, despite his work-related injuries. Comparing $360 per week with claimant's pre-accident wage of $563.52 per week yields a 36 percent wage loss.

Consequently, claimant's wage loss is 100 percent through March 6, 2005, followed by 36 percent.

3. What is claimant's task loss?

As indicated above, claimant's medical expert, Dr. Koprivica, concluded claimant should limit himself to sedentary activities. The doctor also reviewed the list of former work tasks prepared by Mr. Dreiling and indicated claimant could no longer perform 16 of the 22 tasks, or 73 percent.[8] The doctor was uncertain whether claimant could perform five of the remaining six tasks.

On the other hand, Dr. MacMillan reviewed Mr. Dreiling's task list along with a list prepared by Mr. Cordray. As indicated above, Dr. MacMillan believed claimant could perform sedentary work as well as some light to medium work. Accordingly, Dr. MacMillan's task loss opinion ranged from a low of 23 percent[9] (lost five of 22 tasks) to a high of 64 percent[10] (lost 14 of 22 tasks).

[8] As shown by the exhibits, task number 7 was not included in the documents the doctor reviewed.

[9] That percentage is from restricting claimant to light-medium activities and considering Mr. Dreiling's task list, which omitted task number 7. Therefore, Mr. Dreiling's task list contained only 22 tasks.

[10] That percentage is derived from restricting claimant to sedentary activities and considering Mr. Dreiling's task list.

The evidence establishes that claimant's task loss falls somewhere between 23 and 73 percent. Accordingly, the Board concludes claimant has sustained a task loss of approximately 50 percent. Averaging the 100 percent wage loss with the 50 percent task loss creates an initial work disability of 75 percent. Averaging the 36 percent wage loss with the 50 percent task loss creates a work disability of 43 percent. Consequently, claimant's permanent partial general disability is 75 percent until March 7, 2005, when it decreases to 43 percent.

4. Should claimant's right to request additional medical benefits be terminated due to the March 2005 accident?

The Board concludes claimant should be allowed to request additional medical benefits for the injuries sustained in his March 29, 2004, work-related accident. Should a question arise whether certain medical treatment is related to the March 2004 accident or the March 2005 accident, the parties may present their evidence to the Judge for determination.

AWARD

WHEREFORE, the Board modifies the May 1, 2006, Award entered by Judge Foerschler.

Robbie M. Medellin is granted compensation from Goodyear Tire & Rubber Company and its insurance carrier for a March 29, 2004, accident and resulting disability. Based upon an average weekly wage of $563.52, Mr. Medellin is entitled to receive 26.60 weeks of temporary total disability benefits at $375.70 per week, or $9,993.62.

For the period ending March 6, 2005, Mr. Medellin is entitled to receive 22.29 weeks of permanent partial general disability benefits at $375.70 per week, or $8,374.35, for a 75 percent permanent partial general disability.

For the period commencing March 7, 2005, Mr. Medellin is entitled to receive 151.17 weeks of permanent partial general disability benefits at $375.70 per week, or $56,794.57, for a 43 percent permanent partial general disability.

The total award is $75,162.54.

As of August 10, 2006, Mr. Medellin is entitled to receive 26.60 weeks of temporary total disability compensation at $375.70 per week, or $9,993.62, plus 96.86 weeks of permanent partial general disability compensation at $375.70 per week, or $36,390.30, for a total due and owing of $46,383.92, which is ordered paid in one lump sum less any

amounts previously paid. Thereafter, the remaining balance of $28,778.62 shall be paid at $375.70 per week until paid or until further order of the Director.

Future medical benefits may be considered upon proper application to the Director.

The record does not contain a fee agreement between claimant and his attorney. K.S.A. 44-536 requires that the Director review such fee agreements and approve such contract and fees in accordance with that statute. Should claimant's counsel desire a fee be approved in this matter, he must submit his contract with claimant to the Judge for approval.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this _____ day of August, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Keith V. Yarwood, Attorney for Claimant
James K. Blickhan, Attorney for Respondent and its Insurance Carrier